FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-3

CURTIS PARHAM,

Appellant,

versus

ELLIS FRANKLIN HUGHES,

Appellee.

Appeal from the Supreme Court
of the State of Georgia

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

SUPPLEMENT TO APPELLANT'S STATEMENT OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A.

Georgia Civil Code of 1910, §3012 (*Georgia Code Annotated* §74-101):

> §74-101 (3012) *What Children are Legitimate; Presumption; Legitimation by Marriage of Parents*
>
> All children born in wedlock, or within the usual period of gestation thereafter, are

legitimate. The legitimacy of a child thus born may be disputed. Where possibility of access exists, except in cases of divorce from bed and board, the strong presumption is in favor of legitimacy, and the proof should be clear to establish the contrary. If pregnancy existed at the time of the marriage, and a divorce is sought and obtained on that ground, the child, though born in wedlock, is not legitimate. *The marriage of the mother and reputed father of an illegitimate child, and the recognition of such child as his, shall render the child legitimate; and in such case the child shall immediately take the surname of his father.*

(Emphasis Added).

B.

Georgia Civil Code of 1910, §3013 (*Georgia Code Annotated* §74-103):

74-103 (3013) Legitimation by Order of Court; Petition; Notice of Proceedings

A father of an illegitimate child may render the same legitimate by petitioning the Superior Court of the county of his residence, setting forth the name, age, and sex of such child, and also the name of the mother; and if he desires the name changed, stating the new name, and praying the legitimation of such child. Of this application the mother, if alive,

shall have notice. Upon such application, presented and filed, the court may pass an order declaring said child to be legitimate, and capable of inheriting from the father in the same manner as if born in lawful wedlock, and the name by which he or she shall be known.

C.

Georgia Civil Code of 1910, §3028 (*Georgia Code Annotated* §74-203):

74-203 (3028) Mother's Rights

The mother of an illegitimate child shall be entitled to the possession of the child, unless the father shall legitimate him as before provided. Being the only recognized parent, she may exercise all the paternal power.

D.

1943 Georgia Laws, p. 538 (*Georgia Code Annotated* §74-204):

74-204 Judicial Discrimination on Account of Illegitimate Birth Prohibited

No court, commission or quasi-judicial body shall discriminate against any person because of his illegitimate birth.

E.

1943 Georgia Laws, p. 538 (*Georgia Code Annotated* §74-205):

> *74-205 Mother Suing for Injury or Death Not Discriminated against because of Child's Illegitimate Birth*
>
> The mother of an illegitimate child, in an action for damages arising out of injuries to or the death of her child — whether she sue in her own right or in her capacity as guardian, executor, or administrator — shall not be discriminated against because of such child's illegitimate birth.

F.

1924 Georgia Laws, p. 60; *1969 Georgia Laws*, p. 762 (*Georgia Code Annotated* §105-1309)

> *105-1309 Recovery by Administrator of Decedent*
>
> In cases where there is no person entitled to sue under the foregoing provisions of this Chapter, [the Georgia Wrongful Death Chapter], the administrator or executor of the decedent may sue for and recover and hold the amount recovered for the benefit of the next of kin. In any such case, the amount of the recovery shall be the full value of the life of the decedent.

SUPPLEMENT TO APPELLANT'S STATEMENT OF THE CASE

In his statement of the case, Appellant has failed to point out to this Court that he never legitimated the child pursuant to the provisions of *Georgia Code Annotated* §74-103 (*Georgia Civil Code of 1910* §3013) (R. 10, 12). Additionally, under the laws of the State of Georgia, it is a misdemeanor for the putative father of an illegitimate child to "abandon" said child, *i.e.*, fail to support, and if the accused father is convicted, he is required to pay the reasonable medical expenses incurred on behalf of the mother due to the birth of the child. *Georgia Code Annotated* §74-9902.

SUMMARY OF ARGUMENT

I.

Classifications based on illegitimacy are not "suspect" and justifications therefor are not required to survive "strict security". *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459 (1977). No case cited by the Appellant has ever held that the father of an illegitimate child has a right to bring an action for the alleged wrongful death of such child. In fact, of the fourteen cases decided by this Court dealing with illegitimacy, only three were concerned with the rights of the parents as opposed to the rights of the illegitimate children. *Glona v. American Guarantee and Liability Insurance Company*, 391 U.S. 73, 88 S.Ct. 1515 (1968), held that the mother of an illegitimate child could sue for the death of her child;

Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208 (1972) was concerned with a natural father who wanted the custody of his children and who was fighting for the right to rear and care for such children, thus easily distinguishable from the case at bar; and *Quilloin v. Walcott,* 98 S.Ct. 549 (1978) denied the right to the father of an illegitimate child to veto the adoption of said child.

Thus, it is Appellee's position that the decisions of this Court do not demand that the Constitution of the United States is offended by denying the natural father of an illegitimate child the right to bring an action for the alleged wrongful death of said child. Additionally, Appellee respectfully submits that the exclusion of fathers of illegitimate children from the benefits of a wrongful death action is substantially related to the legitimate state interest of avoiding problems with proof of paternity; of encouraging fathers of illegitimate children to legitimate their children; of encouraging settlements; of promoting legitimate family relationships; of avoiding spurious claims; and of setting a standard of morality.

II.

As the right to bring an action for wrongful death was unknown at common law, it is in derogation of the same and must be strictly construed. Since the mother of an illegitimate child is the only recognized parent and is granted full parental rights by *Georgia Code Annotated* §74-203 and as the father did nothing to legitimate his

child, Appellee respectfully submits that it is not an impermissible discrimination based upon sex to grant the mother of an illegitimate child the right to recover and not the father.

ARGUMENT AND CITATION OF AUTHORITY

I.

Georgia Code Annotated §105-1307 Does Not Violate The Due Process And Equal Protection Clauses Of The United States Constitution By Allowing The Mother Of An Illegitimate Child To Recover For That Child's Wrongful Death While Denying That Right To The Putative Father Of The Child.

Prior to considering Appellant's arguments posited under this section of his brief, Appellee would respectfully submit that classifications based on illegitimacy are not "suspect", and justifications are not required to survive "strict scrutiny." *Mathews v. Lucas,* 427 U.S. 495, 96 S.Ct. 2755 (1976); *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. 1459 (1977). Furthermore, this Court has previously stated in *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. 1459, 1465 (1977) that:

> 'The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust.

> Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrong-doing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual — as well as an unjust — way of deterring the parent.'. . .
>
> *The parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status.*

(Emphasis Added).

In not one of the cases cited by the Appellant has the United States Supreme Court ruled that the natural father of an illegitimate child has a right of action for the death of the child.

It should be noted that in 1977, this Court in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, stated in footnote 11 of its opinion that said case represented the twelfth time since 1968 that this Court has considered the constitutionality of alleged discrimination on the basis of illegitimacy. Those decisions were cited as being: *Mathews v. Lucas*, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976); *Beaty v. Weinberger*, 478 F.2d 300 (CA 5, 1973), summarily aff'd, 418 U.S. 901, 94 S.Ct. 3190, 41 L.Ed.2d 1150 (1974); *Jimenez v. Weinberger*, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974); *New Jersey Welfare*

Rights Organization v. Cahill, 411 U.S. 619, 93 S.Ct. 1700, 36 L.Ed.2d 543 (1973); *Griffin v. Richardson*, 346 F.Supp. 1226 (Md.), summarily aff'd, 409 U.S. 1069, 93 S.Ct. 689, 34 L.Ed.2d 660 (1972); *Davis v. Richardson*, 342 F. Supp. 588 (Conn. 1972), aff'd 409 U.S. 1069, 93 S.Ct. 678, 34 L.Ed.2d 659 (1972); *Gomez v. Perez*, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972); *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971); *Glona v. American Guarantee and Liability Insurance Company*, 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968); *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968).In all of the cases with the single exception of *Glona, supra*, this Court dealt with the rights of an illegitimate child and not with the parents of said child. Although the Court did not cite *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972) as a case dealing with illegitimacy, Appellant has relied on *Stanley, supra*, as authority for certain of the propositions advocated by him. However, *Stanley, supra*, is easily distinguishable from the instant action as this Court was there concerned with a natural father of illegitimate children who wanted the custody of said children and who was fighting for the right to rear and care for such children. It is obvious that such rights are not before the Court at this time since the Appellant herein had never exercised any of the avenues available to him to remove the stigma of *filius nullius* from the deceased child and to obtain the custody of said child. Rather than making any attempt to gain full parental rights and to declare his illegitimate child a full and

recognized member of society, Appellant did nothing and only sought to utilize the processes of the law after the death of his child, in an action for damages.

As pointed out hereinabove, young Lemuel Parham had nothing to do with the circumstances of his birth and Appellee agrees that in accord with the decisions of this Court cited above, it would be unjust to deprive him, solely due to his illegitimacy, of any rights given to legitimate persons. However, we should bear in mind that we are not here dealing with the rights of the child but the rights of the father who had never sought to remove the legal epitaph from his child; and Appellee respectfully submits that depriving the natural father of an illegitimate child of the right to bring an action for damage for the alleged wrongful death of said child does bear "some rational relationship to legitimate state purposes."

Problems With Proof of Paternity

All of the cases cited by Appellant in Division I of his argument and citation of authority concerning the legitimate state interest in problems with proof of paternity deal with depriving illegitimate children of rights and benefits bestowed upon legitimate children. The State of Georgia in *Georgia Code Annotated* §74-204 has already statutorily recognized that an illegitimate child cannot be discriminated against because of its birth. Georgia also makes the mother the custodian of the child and rests all parental rights in her. *Georgia Code*

Annotated §74-203. Thus, the whole legislative scheme in Georgia is such that an illegitimate child is, as to himself, placed in the exact same position as a legitimate child, all of which is in line with the decisions of this Court and which incidentally, was done prior to 1968, the first decision of this Court concerning illegitimates. As the State has placed the custody of an illegitimate child and the obligation to rear said child in the hands of his mother (*Georgia Code Annotated* §74-203), the State has also awarded the right to that mother to bring an action for the alleged wrongful death of her illegitimate child.

Even though the Appellant makes a great issue of the fact that he paid the birth expenses and assisted in supporting the child, he fails to point out that, if he had not done so voluntarily, both the mother and the State could have forced him to do the same things. *Georgia Code Annotated* §§74-202; 74-9902. What right or benefit has the Appellant been deprived of by being denied the right to bring an action for the alleged wrongful death of his child? At common law, such a right for wrongful death was not granted to any person whomsoever, legitimate or illegitimate; such a right is granted only by statute and is to be strictly construed. *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 770 (5th Cir. 1976); *Thompson v. Watson*, 186 Georgia 396, 197 S.E. 774 (1938); *Lovett v. Garvin*, 232 Georgia 747, 208 S.E.2d 838 (1974). As such, Appellee respectfully contends that the problems of proving or disproving paternity in a case where practically anyone could come forward and claim to be the

father in order to share in or to reap the benefits of a wrongful death recovery without any of the attendant responsibilities is certainly a legitimate state interest to be protected and was so recognized by the Georgia Supreme Court in its opinion (Jurisdictional Statement - pages 1a, 3a and 4a).

Georgia Code Annotated §105-1309 provides for a recovery by the administrator or executor of the estate of a deceased person if there is no person entitled to sue under the other provisions of the Georgia Wrongful Death Statutes. No right of action for such a death has been denied. In fact, the grandmother of the deceased Lemuel Parham has qualified as administratrix and has brought an action for the death of said child pursuant to this very code section (R. 15-17). Appellant can certainly make a claim in the Probate Court for his share of any proceeds of recovery and fight his battle of paternity there without subjecting alleged tort feasors to complete uncertainty.

Additionally, another legitimate state interest to be served in denying the natural father of an illegitimate child, regardless of the amount of support provided to the child, the right to sue for the alleged wrongful death of the child, is the very legitimate and indeed practicable state interest of encouraging settlements of disputes between parties and in avoiding litigation and appeals.

In *Williams v. First National Bank of Pauls Valley*, 216 U.S. 582, 595 (1910), this Court stated that:

> Compromises of disputed claims are favored by the Court (Hennessy v. Baker, 137 U.S. 78 . . .).

If this Court were to rule, as requested by Appellant, that the natural father of an illegitimate child has a right of action for the death of the child, when there is no natural mother in life, no defendant could ever settle a case with certainty. Although in the case at bar, the natural father was known, this would obviously not be true in the vast majority of cases. A defendant would be faced with the distinct possibility of paying twice or going to the problem and expense of attempting to locate a natural father which, after a period of time, would be most difficult and perhaps impossible. Additionally, a holding that the natural father could bring an action for the death of an illegitimate child could cause a deluge of spurious and nuisance suits which a defendant would be compelled to defend in an attempt to prove lack of paternity. In such a case, because of the uncertainties involved, each alleged tort feasor would be compelled to await legal action which would have to be carried by appeal to final judgment by the highest appellate court so as to avoid being subjected to "double jeopardy".

Encouraging Fathers of Illegitimate Children to Legitimate Their Children

Appellee respectfully submits that the state's interest in encouraging fathers of illegitimate children to take the necessary steps which the legislature has provided to legitimate their children is a very real one and is rationally and reasonably related to excluding the fathers from bringing a wrongful death action for the alleged death of his children. Although Appellant argues that it is unreasonable that the state places the entire responsibility of legitimating children on fathers and not the mothers, Appellee would ask the Appellant just how is a mother supposed to legitimate a child? If a mother could legitimate a child, there would probably be no illegitimate children, except by choice, and the issues raised in this case would be moot. Obviously, the father is the only person who can legitimate a child. No matter how archaic it may appear, it is sound, practical and logical.

In support of his position that the legitimation of children is not a legitimate state interest served by the exclusion of the father from a wrongful death recovery, Appellant argues that the father suffered loss from the child's death. Althought the Appellant may have mourned the loss of his son and suffered grief, it is inconceivable to this Appellee that the Appellant would argue that he is entitled to recover for the death of the child when he neglected to legitimate the child when he could have easily done so by marry-

ing the mother or petitioning the court for legitimation. The same alternatives were available to the father in *Quilloin v. Walcott*, 98 S.Ct. 549 (1978) in order to grant the father of the illegitimate child in that case the right to veto the adoption of said child. The father had never exercised either of the alternatives, and this Court affirmed the Georgia statutes denying the father of an illegitimate child the right to veto the adoption of said child if the mother of the illegitimate child consents to the adoption.

The same state interest of rearing children in a family setting which was recognized and protected by this court in *Quilloin v. Walcott, supra*, is also a legitimate state interest to be protected in the case at bar. Since the mother is charged under Georgia law as the only recognized parent and is given exclusive authority to exercise all parental prerogatives (*Georgia Code Annotated* §74-203), she certainly should be accorded the right to consent to the adoption of the child and the right to bring an action for the alleged wrongful death of the child. If the father wishes to gain the same rights, Georgia has provided a method by which he can do so. If he fails to exercise his alternatives, this Court has held that he cannot veto the adoption of the child, and Appellee respectfully submits that it should hold that he cannot bring an action for the alleged wrongful death of the child. Is it too severe a penalty to impose upon a father who willingly allows his child to remain illegitimate, a status the child cannot change through any actions of his own, to deny that father the right to

bring an action for damages for the alleged wrongful death of said child? Appellee respectfully submits that the answer to this question is no.

Promoting Legitimate Family Relationships, Avoiding Spurious Claims and Setting a Standard of Morality

In attempting to demonstrate that the above are not legitimate state interests substantially related to excluding fathers of illegitimate children from the right to bring a wrongful death action, Appellant argues that these interests are not promoted by allowing one party to the illegitimate act from recovering while denying it to the other. Appellant refers continuously throughout his brief to punishing the males and rewarding the females. Although it may now be archaic and chauvinistic, Appellee would respectfully submit that the badge of shame and mortification borne by the mother of an illegitimate child is hardly offset by allowing her to recover for the death of said child. In most instances, the father does not share this shame and humiliation and, in fact, dodges the proverbial shotgun wedding like the plague. As the mother is the parent charged under Georgia law for the rearing of an illegitimate child, Appellee submits that the State of Georgia is entitled to exact a penalty from the father for not legitimating the child in the manner provided by law.

Appellant also argues that denying the father of an illegitimate child the right of an action for the alleged

wrongful death of the child does not promote the state's interests in rearing children in a family setting and in promoting a high standard of morality. However, Appellant fails to point out that the father of the deceased child in this case did not come forward and seek the benefits of the laws of the State of Georgia until the child was dead and a possible monetary benefit might be derived therefrom. Thus, how can it be said that the exclusion of the father from recovery is not an incentive to the father to marry the mother and legitimate the child?

Insofar as the legitimate state interest of avoiding spurious claims, Appellee can only say that if this Court were to rule in favor of the Appellant in this case, the red clay hills of Georgia will from time to time reverberate to the voices crying "I am the father", "I am the father" just as the hills of Rome rang with the cries "I am Spartacus" when the slave uprising against Rome was quelched and Spartacus was sought by the victorious general. No defendant, in the position of Appellee, could ever settle a case with certainty and could conceivably have to pay each putative father that came forward with a claim which he did not successfully defend unless the defendant went to final judgment. What a shameful waste of judicial process!

The Decision of this Court in Quilloin v. Walcott, *98 S.Ct. 549 (1978) Is Not Distinguishable And Should Be Controlling In This Case.*

Appellee respectfully submits that just as the father in *Quilloin, supra,* had never exercised actual or legal

custody over his child, the Appellant in this case never did either. Although he supposedly visited the child on a daily basis and paid support for the child, so did the father in *Quilloin v. Walcott*, Id. at 552-553. Although he may have visited the child, there is nothing in this record to support any allegation as maintained by the Appellant that he had "shouldered significant responsibility with regard to the supervision, education, protection and care of his child." Is the question of who can maintain a cause of action for the alleged wrongful death of an illegitimate child dependent upon such a finding of fact by a jury? Another jury considering the claims of another "father" may arrive at a different conclusion. What then? The mere fact that he visited with the child means nothing as is illustrated by this Court's opinion in *Quilloin, supra*, at page 553.

As this Court recognized in *Quilloin, supra*, the father in that case had the alternatives available to him to marry the mother or legitimate the child and did neither. Here, the appellant had the same alternatives and did nothing but now asks this Court to protect and to reward him for his inaction under the guise of equal protection and due process. Appellee respectfully submits that the state's interests cited by the Georgia Supreme Court in its opinion (Jurisdictional Statement, pages 1a-8a) are all substantially related to excluding the father of an illegitimate child from recovery for the alleged wrongful death of said child.

II.

The Georgia Wrongful Death Statute Which Allows The Mother Of An Illegitimate Child To Recover For Its Wrongful Death But Denies That Right To The Father Does Not Constitute Impermissible Discrimination Based On Sex.

As already pointed out, an action for wrongful death was unknown at common law and is purely a creature of statute. As such, it is within the legislature's power to provide who can and who cannot bring an action for the wrongful death of a child. Georgia has provided that the mother, if alive, is the exclusive party to bring an action for the alleged wrongful death of her child. This is true even if the mother and father are divorced and the father has exclusive custody of the children. Appellee respectfully submits that the Appellant stands in no better position than a divorced father who has exclusive control and custody of the children but is denied the right to bring an action for the death of the children by the Georgia Wrongful Death Statutes.

Appellant argues that the state interest of encouraging fathers of illegitimate children to legitimate the child by petition or by marrying the mother is not served by denying the father of the illegitimate child the right of bring an action for the alleged wrongful death of the child. He further argues that the Georgia Supreme Court did not discuss the fact that the mother was allowed to recover even though she did not have to

make an effort to legitimate the child or to marry the father and that the Supreme Court of Georgia had the rather archaic notion that the father of the illegitimate child is usually the parent who has control over whether a legitimate family unit will exist (See Georgia Supreme Court opinion, Jurisdictional Statement — page 7a). Again, Appellee would ask the Appellant how is the mother to legitimate the child by either petition or by marriage? There is simply no way that this could be done, and the Georgia law provides that the mother is the only recognized parent and is given exclusive authority to exercise all parental prerogatives (*Georgia Code Annotated* §74-203). This code section was discussed in *Quilloin, supra*. As the mother is the only recognized parent and as the father has done nothing to remove the stigma of *filius nullius* from the child, Appellee respectfully submits that denying him the right to recover is not an impermissible discrimination based on sex.

CONCLUSION

For the foregoing reasons, Appellee respectfully submits that the decision of the Georgia Supreme Court should be affirmed and that this Honorable Court should decide that the Georgia Wrongful Death Statute as set out in *Georgia Code Annotated* §105-1307 is not constitutionally infirm in any respect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, A. Montague Miller, Counsel for the Appellee in the above styled action, do hereby certify that I have served three copies of the within and foregoing BRIEF OF APPELLEE upon:

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Lemuel Moreen Parham, Deceased)

The above listed parties are all parties which the Rules of the United States Supreme Court require service in compliance with Rule 33 of the Rules of the United States Supreme Court by depositing three true and correct copies of the same in the United States Mail, properly addressed, and with sufficient postage affixed thereon.

This ____ day of December, 1978.

A. MONTAGUE MILLER
ATTORNEY FOR ELLIS
FRANKLIN HUGHES